



August 7, 2012

Freedom of Information Request
DO, Assistant Director
Disclosure Services
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

RE: FOIA Request – Certain Leg Affairs Records regarding “carbon”

BY FACSIMILE -- 202.622.3895

Dear Treasury FOIA Staff,

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq. and the Department of Treasury’s implementing regulations, please provide us within twenty (20) days copies of any and all record(s), correspondence, memoranda, analysis, email or other **records using the word “carbon”** which were produced, sent or received by the **Office of Legislative Affairs** during 2012, **from January 1, 2012 until the date you process this Request.**

This Request contemplates copies of documents, in electronic format if you possess them as such, otherwise photocopies are acceptable.

We note that we are sending **two separate requests** today which, while seeking records of the same description are directed to two different offices within the Treasury Department. As such, **they are distinct requests. Each is a “simple” request.** As no economy is created given the requests are directed at two different offices, Treasury is not to bundle them as one request to be handled as one request, or otherwise construct a request or framework altering our requests and their “simple” forms.

Scope of Request: Offices and Period Covered

This Request applies to the Office of Legislative Affairs.

Please identify and inform us of all responsive or potentially responsive documents within the statutorily prescribed time, and the basis of any claimed exemptions or privilege and to which specific responsive or potentially responsive document(s) such objection applies.

Further, please inform us of the basis of any partial denials or redactions. Specifically, if your office takes the position that any portion of the requested records is exempt from disclosure, we request that you provide us with an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1972), with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA” pursuant to *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979), and “describ[ing] each document or portion thereof withheld, and for each withholding it must discuss the consequences of supplying the sought-after information.” *King v. Department of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987).

In the event that some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable, non-exempt portions of the requested records. See 5 U.S.C. §552(b). If it is your position that a document contains non-exempt segments and that those non-exempt segments are so dispersed throughout the documents as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. *Mead Data Central v. Department of the Air Force*, 455 F.2d 242, 261 (D.C. Cir. 1977).

Claims of non-segregability must be made with the same practical detail as required for claims of exemption in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

Satisfying this Request contemplates providing copies of documents, in electronic format if you possess them as such, otherwise photocopies are acceptable. By this we mean that no delay should be incurred on the basis that the records are held in a particular format and must be transferred as we seek them as held in whatever medium or bearing whatever physical characteristics may be the case.

Please provide responsive documents in complete form, with any appendices or attachments as the case may be.

Request for Fee Waiver

We note that this Request is sufficiently specific and narrow and requires no forwarding to other offices for processing, and is a “simple” Request.

Regardless, we request your office(s) waive any fees associated with this request. As explained below, this FOIA Request satisfies the factors listed in Treasury’s governing regulations for waiver or reduction of fees, as well as the requirements of fee waiver under the FOIA statute - that “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii), see also *inter alia* 31 C.F.R. Part 1, § 1.7(d)(1).

CEI is a nonprofit, tax-exempt public interest organization, with formal research, educational and publication functions as part of its mission, and release of these records will serve the public interest by contributing significantly to the public’s understanding of the controversial topics of environmental and energy-related policy and specifically tax policy and discussion of possible tax proposals, and because such a release is not primarily in our organization’s commercial interest.

CEI has no commercial interest in obtaining the requested information. Instead, CEI intends to use the requested information to inform the public, so the public can meaningfully assess claims made by government agencies and participate in the policymaking process related to energy taxes with complete, relevant information. Neither CEI nor any foreseeable party will derive economic benefit from the requested material. No “specialized use” of the documents is anticipated outside of that described herein.

If our fee waiver request is denied we are willing to pay up to \$150.00, and in the event of any appeal as appropriate and regardless of that outcome or your response to this fee waiver request we request the search and document production proceed in the interim.

CEI has spent years promoting the public interest advocating sensible policies to protect human health and the environment, and has routinely received fee waivers under FOIA.

1. The subject matter of the requested records must specifically concern identifiable operations or activities of the government. A request for access to records for their informational content alone does not satisfy this factor.

The requested records relate to Treasury’s internal deliberations, or deliberations with others inside government and without, over the idea or prospect of a carbon tax or other effort to regulate carbon dioxide, no such proposal which yet exists (as such, Exemption

5 is not a reasonable claim in this matter). This process, these discussions and the policies and procedures on which they are based are unquestionably "identifiable operations or activities of the government." The Department of Justice Freedom of Information Act Guide expressly concedes that "in most cases records possessed by federal agency will meet this threshold" of identifiable operations or activities of the government. There can be no question that this is such a case.

2. For the disclosure to be "likely to contribute" to an understanding of specific government operations or activities, the releasable material must be meaningfully informative in relation to the subject matter of the request.

The disclosure of the requested documents must have an informative value and be "likely to contribute to an understanding of Federal government operations or activities." The Freedom of Information Act Guide makes it clear that, in the Department of Justice's view, the "likely to contribute" determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain. The requested records are "likely to contribute" to an understanding of your agency's decisions because they are not otherwise in the public domain and are not accessible other than through a FOIA request.

Given the anticipated economic impact to flow from the relevant government policies that would be impacted by the activities at issue here, it is important for information relating to deliberations, or deliberations with others inside government and without, over the prospect of a carbon tax or other effort to regulate carbon dioxide, to be made available to the public. This information will facilitate meaningful public participation in the decision-making process, therefore fulfilling the requirement that the documents requested be "meaningfully informative" and "likely to contribute" to an understanding of your agency's decision-making process with regard to the high hazard sites.

3. The disclosure must contribute to the understanding of the public at large, as opposed to the understanding of the requester or a narrow segment of interested persons. One's status as a representative of the news media alone is not enough.

Under this factor, the identity and qualifications of the requester—i.e., expertise in the subject area of the request and ability and intention to disseminate the information to the public—is examined. As described above and below, CEI has a longstanding interest and expertise in the subject of energy- and environment-related regulatory policies.

More importantly, CEI unquestionably has the "specialized knowledge" and "ability and intention" to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the "public-at-large."

CEI professionals appear regularly on radio and television shows to discuss issues on which they work, and similarly write in newspapers and for numerous other publications with broad readership including the National Review, Daily Caller, Pajamas Media, Big Government, and American Spectator websites.

CEI intends to disseminate the information it receives through FOIA regarding these government operations and activities in a variety of ways, including but not limited to, analysis and distribution to the media, distribution through publication and mailing, posting on the organizations' websites, emailing and list-serve distribution to members.

CEI publishes that upon which it works via print and electronic media, as well as newsletters to legislators, education professionals and other interested parties. Those activities are in fulfillment of CEI's mission.

The information received will be disseminated through a) membership newsletters, b) opinion pieces published in national and local newspapers and magazines, c) CEI's websites which receive approximately 80,000 monthly visitors (appx. 40,000 unique), d) in-house publications for public dissemination, e) other electronic journals including "blogs" to which our professionals contribute, f) as relevant, local and syndicated radio programs dedicated to discussing public policy and on which CEI professionals including the author of this request make regular appearances, and g) to the extent Congress or states engaged in relevant oversight or related legislative or judicial activities find that which is received noteworthy, it will become part of the public record on deliberations of the legislative branches of the Federal and State Governments on the relevant issues.

There has been great public interest, both in the past month and during previous discussions of Btu taxes, cap-and-trade and similar energy tax policies which are the core of this FOIA Request, to judge by internet and media attention, and thereby the request for fee waiver. To deny this would be *prima facie* capricious.

4. The disclosure must contribute "significantly" to public understanding of government operations or activities.

The records requested will contribute to the public understanding of the government's compliance with policies and practices governing permissible activities for its employees. There is currently no information publicly available regarding the requested information. Absent disclosure of the records requested, the public's understanding will be shaped only by what is disclosed by the private interests involved.

The records requested will contribute to the public understanding of the government's role, or their "operations and activities" associated with this critically important

information. The disclosure of the requested records is also essential to public understanding of the state o play of discussions involving a rumored effort to impose a carbon tax during a lame-duck session of Congress as part of a broader tax deal. After disclosure of these records, the public's understanding of this process will be significantly enhanced, and they will be better informed if and when the idea is sprung on them or their elected representatives. The requirement that disclosure must contribute "significantly" to the public understanding is therefore met.

5. The extent to which disclosure will serve the requester's commercial interest, if any.

As already stated CEI has no commercial interest in the information sought or otherwise in the requested records. Nor does CEI have any intention to use these records in any manner that "furthers a commercial, trade, or profit interest" as those terms are commonly understood. CEI is a tax-exempt organization under sections 501(c)(3) and with related operations under 501(c)(4) of the Internal Revenue Code, and as such has no commercial interest. The requested records will be used for the furtherance of CEI's mission to inform the public on matters of vital importance to the regulatory process and policies relating to energy, the environment and public health.

6. The extent to which the identified public interest in the disclosure outweighs the requester's commercial interest.

See initial Request and answer to "5" above. Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester." When a commercial interest is found to exist and that interest would be furthered by the requested disclosure, an agency must assess the magnitude of such interest in order to compare it to the "public interest" in disclosure. If no commercial interest exists, an assessment of that non-existent interest is not required. As noted above, CEI has no commercial interest in the requested records.

As such, the identified public interest in the disclosure outweighs the requester's (non-existent) commercial interest. When a commercial interest is found to exist and that interest would be furthered by the requested disclosure, an agency must assess the magnitude of such interest in order to compare it to the "public interest" in disclosure. If no commercial interest exists, an assessment of that non-existent interest is not required. As noted above, CEI has no commercial interest in the requested records.

We respectfully request, because the public will be the primary beneficiary of this requested information, that Treasury waive processing and copying fees pursuant to 5

U.S.C. §552(a)(4)(A). For reasons stated above, CEI has its fees waived regularly by federal agencies and has in the past in response to a similar request, regarding cap-and-trade (2009).

In the event that your agency denies a fee waiver, please send a written explanation for the denial. Also, please continue to produce the records as expeditiously as possible, but in any event no later than the applicable FOIA deadlines.

Sincerely,

Christopher C. Horner, Esq.
CHorner@cei.org

1899 L Street NW, Suite 1200
Washington, DC 20036
202.331.2260 (O)